

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

703

To be argued by
JONATHAN J. SILBERMANN

Plaintiff-Appellee,

-against-

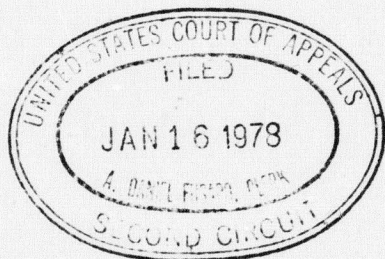
Defendant-Appellant.

Docket No. 77-1382

B p/s

BRIEF FOR APPELLANT
FREDERICK J. MONTELBANO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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-against-

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QUESTIONS PRESENTED

1. Whether the judge's failure, despite defense counsel's request to instruct the jurors on the fallibility of eye-witness testimony and to guide their determination on the question is reversible error.

2. Whether the rulings of the district court precluded appellant from presenting his defense to the jurors.

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STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Thomas P. Griesa) rendered on September 7, 1977, after a jury trial, convicting appellant Montelbano of conspiracy to steal an interstate shipment of freight (Count I) (18 U.S.C. §371, 659), the actual theft of that shipment (Count III) (18 U.S.C. §659), and the obstruction of commerce by robbery (Count II) (18 U.S.C. §1951). Appellant was sentenced to five years' imprisonment on each count, the sentences to run concurrently.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment* and Pre-Trial Proceedings

On March 15, 1977, an indictment was filed charging appellant with conspiring to steal an interstate shipment of seafood (Count I), its actual theft on December 7, 1976, from a truck

*The indictment is "B" to appellant's separate appendix.

operated by the O. K. Trucking Company (Count II), and obstructing commerce by the robbery of the shipment (Count III).

Prior to trial, appellant moved for an order disclosing the name and address of a government informant and a truck driver, who, during the early morning hours of December 7, 1976, saw three white males in a red Rambler bearing New York license plate number 510 CTF -- the car subsequently used in the hijacking. These men were seen in the car on Tenth Avenue and 17th Street in New York City, in the area where the crime occurred. (Rec. on App., Doc. No. 5, ¶IIF et seq.; Doc. No. 11). Appellant's motion was supported by the report of N.Y.C. police officer Trefcer, dated December 9, 1976, which states, in pertinent part:

A confidential source states that three (3) male, whites were hanging out in the vicinity of West 17th Street and 10th Avenue on 12/7/76 at approximately 0500 hrs. and had approached a driver, who was picking up a shipment of shrimp from Merchants Refrigeration. The driver stated to our source that one of the males wanted to know why the driver had parked near their auto. The driver noticed the auto to be a RED RAMBLER SEDAN. A short time later the driver noticed the three males drive by in the same auto and he copied the plate number 510 CTF (NY). The confidential source also stated he had seen the same auto and the same three men. The source further stated that the driver and he could identify all or some of these individuals. He described them as follows:

- #1 M W 5'8" med. build wearing a loud colored wool hat
- #2 M W 5'8" med. build
- #3 M W 5'10" stocky 200 lbs. or more, wearing a cap with a peak.

(Annexed as an Exhibit to
Rec. on App., Doc. No. 11).

In response, the Government filed an affidavit by FBI

Agent Ronald Kosednar (Rec. on App., Doc. No. 14), which related the results of the agent's interviews of the informant on May 18 and 20, 1977, respectively. The informant confirmed that on December 7, 1976, he saw three men in a red Rambler and that he was told by a truck driver, to whom one of the men spoke, that the truck driver saw the car that day near the Fulton Fish market and that its license plate number was 510 CTF. Further, the informant described the men he saw in the following manner: #1, White, male, about 5'10", over 200 pounds, heavy set, black bushy hair, and wearing a peaked hat; #2, White, male, 5'10", medium, purplish grey knit cap; #3, White, male. Agent Kosednar indicated that on May 20, 1977, he showed the informant a photo spread and a picture of a prior line-up, both of which included appellant, and that the informant failed to select appellant as one of the men in the car (Rec. on App., Doc. No. 14, ¶12(a)(b)). Agent Kosednar stated that the following then occurred:

(d) I then asked the source if he were able to state that any of the individuals in the photographs he viewed were any of the three individuals who were in the red Rambler or standing on the corner of 10th Avenue and West 17th Street. The source responded no.

(e) I then asked the source if he were able to state that any of the individuals in the photographs that he viewed were not among the three individuals in the red Rambler or who were on the corner of 10th Avenue and West 17th Street. Again the source responded no.

(f) Source was then displayed the photo

of Frederick Montelbano and asked if the individual in the photo was known to him. He responded no.

(Rec. on App., Doc. No. 14, ¶12).

The Government opposed the motion for the informant's and the truck driver's identity, contending that disclosure would endanger the informant's life. (Rec. on App., Doc. No. 14; Transcript of July 22, 1977 at 14-15). The District Court denied the motion on this basis and on the ground that the testimony would not be helpful to the defense (Transcript of July 22, 1977 at 12; Transcript of July 25, 1977 at 4-5; Transcript of August 1, 1977 at 2-5).

In light of the District Court's denial of the motion to disclose the informant's identity, by letter dated July 26, 1977, defense counsel, pursuant to Rule 804(b)(5) of the Federal Rules of Evidence, notified the prosecutor that appellant intended to offer various hearsay statements made by the informant.* Specifically, trial counsel intended to offer in evidence the informant's December 9, 1976 statements to police officer Trefcer, the substance of which was contained in Trefcer's police report; the statements made to Agent Kosednar on May 20, 1977, relating to the informant's inability to identify appellant as one of the three men in the Rambler,

*A copy of trial counsel's letter is reproduced as "D" to appellant's separate appendix.

reflected in Kosednar's affidavit (§12(a), (b), (c)); and the informant's statement on December 8, 1976 to FBI Agent Michael Armes as to the description of one of the men, also contained in Kosednar's affidavit (§15).^{*} Over defense objections, Judge Griesa excluded the informant's statements (9).^{**}

B. The Government's Case

Ralph Eme, a truck driver employed by O. K. Trucking Company, testified that on December 7, 1976 at approximately 10:30 a.m., he drove a truck, filled with frozen seafood, to Tenth Avenue and 14th Street in New York City, where he stopped at a red light (26, 28-30, 33). There, a man, identified at trial as "John Doe," opened the door of the truck and got in (33-34).^{***} At Doe's instruction, Eme, who then noticed that the truck was being followed by a red Rambler, drove to the Fulton Fish market (36-39). The driver of the Rambler, described by Eme at trial as 6'1", 160 pounds with "receding hair, thinning on top," and wearing a peacoat and dungarees (39-40), got into the truck, and drove to the Babylon area

^{*}The description was that one of the men in the Rambler wore a purplish-grey knit cap, was 5'10", had a medium build, and walked with a "bent" back.

^{**}Numerals in parentheses refer to pages of the trial transcript.

^{***}Eme described this man as 5'8", approximately 250 pounds, wearing a blue navy peacoat and cap (34).

of Long Island (39-21, 44). Eme testified that he "believed" that the person who drove the truck to Long Island was appellant but that he was not certain of his identification (40, 71). During the ride Eme removed his glasses and was told to look "straight through the windshield" (41-42, 76-77) Eme saw the Rambler following the truck (42).

Eme also testified that at a shopping area in Long Island, he got into the Rambler with Doe and heard the truck leave (46). Approximately one-half hour later (49), the truck returned and an unidentified person, who had been the passenger in the truck, got into the car and drove to another shopping center (50).^{*} According to Eme, there, appellant got in the car and drove off, leaving Eme near the Long Island Expressway at about 3:30 p.m. (51, 60). Eme then walked to a gas station and telephoned the Nassau County police (60, 87).

Further, Eme identified photographs of the car used by the hijackers on that day (47) (GX9A-P).^{**}

^{*}During this portion of the ride, Eme was lying in the back of the car, with his face "to the floor" (50).

^{**}Numerals in parentheses preceded by "GX" refer to the number of the Government's exhibits in evidence. Eme stated that while lying on the floor of the Rambler, he saw that the mileage on the odometer was "58,000 plus;" that the New York State inspection sticker expired in January, and that wires extended under the dashboard, as did a bracket for a tape player or radio (46, 83A-85). Agnes Pollak testified that she owned the 1969 red Rambler bearing license plate 510 CTF and identified GX9B-E and GX 9I-L as photographs of the car (145-146). Further, Pollak stated that on December 7, 1976 appellant had her car from 3:00 a.m. until his return at approximately 6:00 p.m. (148, 160).
FOOTNOTE CONTINUES ON NEXT PAGE.

In addition, Eme testified to his tentative identification of appellant as a result of a line-up held on December 16, 1976, nine days after the hijacking (62). At that time, Eme stated that appellant "could possibly be the man but [he] wasn't totally certain ... "(66).

On cross-examination, Eme indicated that he gave the Nassau County police officer who interviewed him on the day of the hijacking "the best description" he could (88-89), telling the officer that the man who drove the truck to Long Island had black hair, was "in his twenties," "tall, slim," and weighed "between 150 and 165 pounds" (89-90,99).

Appellant's father, Joseph Montelbano, testified as part of the Government's case that he did not remember whether he saw appellant on December 7, 1976 (129). However, Mr. Montelbano explained that on that day he and his wife were away from the family home from 10:00 a.m. to 4:00 p.m., and that if he had seen his son, it would not have been during that period of the day (127-130).* Mr. Montelbano also revealed

FOOTNOTE CONTINUED:

FBI Agent Kosednar identified GX9A-E and 9N as photographs of Pollak's car (298-299) and stated that the mileage on the car was 58,400 (309).

*Appellant's grand jury testimony (GX18) was read to the jurors. In the grand jury appellant stated that on December 7, 1976 he left the Fulton Fish Market at approximately 1:00 p.m., went to a bar, and later visited his mother, returning to his home around 6:00 p.m.

that appellant had had a broken tooth since he was a child (143).*

In proceedings held outside the jurors' presence, the prosecutor moved to quash the defense subpoena of a Nassau County policeman who would have testified to Eme's December 7 description of the hijacker, who, the Government contended was appellant.** Defense counsel argued that "the jury has the right to know what the best descriptions were that the victim gave to these various people" (193) and that Eme's failure on December 7, 1976 to mention or notice whether the hijacker had a cracked tooth -- appellant's most unique feature** -- would be probative evidence that Eme had identified the wrong man (196). Defense counsel also offered in evidence the actual statement given to the policeman -- a "supporting deposition," sworn to under the penalties of state law. This statement was signed by Eme after the December 7 interview.*** Over defense objection, Judge Griesa granted the Government's motion to quash and excluded the statement, holding that the defense was required to confront Eme with the prior statement (198-199).

In accord with this ruling, Judge Griesa similarly precluded the defense from eliciting or proving by documentary evidence the description of the hijackers given to N.Y.C.

*Appellant then displayed his tooth to the jury (143).

**The District Court described the tooth as "a prominent feature" (201).

***In the statement, Eme had described the hijacker who he claimed was appellant as "25 years, 6 feet, 150 pounds, black hair, blue peacoat, dark." This statement (GX3501J) was supplied by the Government as "3500" material and is reproduced as "E" to appellant's separate appendix.

Detective William Lonergan on December 13, 1976 (240). The judge also barred the defense from showing that until December 13, 1976 Eme had failed to describe in detail the car used in the hijacking and that the first police report containing such a description was prepared after this interview on that date and after Eme had been shown photographs of the Rambler.* The defense's motion for reconsideration of the admissibility of the various police reports, as well as motions for a mistrial based on that ruling, was denied (259, 284) and objections sustained to specific questions designed to elicit from Lonergan Eme's December 13, 1976 description of the hijacker and Rambler (281-284).**

In light of this ruling, defense counsel requested an opportunity to recall Mr. Eme (201). In an attempt to resolve the problem and as a result of an agreement between the parties, the Assistant United States Attorney telephoned Eme, who was

*Defense counsel stated that he was "trying to show the first time these descriptions were given was on the 23rd (sic)" (257) and that Eme only gave a detailed description of the car after seeing the car's photographs (256).

**Detective Lonergan and Agent Kosednar testified to various statements made by appellant, including, *inter alia*, that he had Pollak's car on December 7, 1976 in the area of the Fulton Fish Market, where he was looking for work (209-210, 220, 292, 302-303, 321-322, 339, 343); that he did not participate in the hijacking (211, 322); and that if appellant could give information about the hijacking, he would not "because he would wind up in a box" (214, 211, 307).

then in West Virginia. The Assistant United States Attorney and Eme had the following conversation:

MR. SIFFERT [Assistant U.S. Attorney]:

"Q Did you see the defendant's mouth?

[EME]: "A Yes.

"Q Did you notice anything about his mouth?

"A No.

"Q Did you notice whether or not the defendant had straight teeth or cracked teeth or anything unusual?

"A No. I did not notice anything in detail about his teeth.

"Q Did you notice that he did or did not have straight teeth?

"A No, I did not notice his teeth.

"Q Did you notice that he had straight teeth?

"A I did not notice in detail.

"Q Did you notice that he had a cracked tooth?

"A No, I didn't.

"Q Did you describe to any of the police officers who interviewed you anything about his teeth?

"A No.

"Q If I were to tell you that he had a cracked tooth, would that affect your belief that he was one of the participants?

"A No."

(245-246).

The prosecutor then telephoned defense counsel and, at defense counsel's request, asked Eme further questions to which

Eme responded:

"Q Did you describe to the Nassau County Police Department that the second individual who entered the cab of the truck at the fish market had receding hair?

"A I believe I did.

"Q Did you tell that to Detective Loner-gan on the 7th?

"A Yes.

"Q Did you write out a deposition to the Nassau County Police Department?

"A No, I dictated it.

"Q What do you mean by dictate, was it verbatim?

"A I spoke and he wrote. I don't know if he took it word for word.

"Q Did you correct anything you said or did you try to correct or make any additions?

"A No, not that I remember."

(247).

In light of the truck driver's statements and prior testimony, defense counsel requested that Eme's return to New York be required:

I [Mr. Gordon] think the jury has a right to know about that [Eme's statements], and that justice requires that he be called back.

(250).

The judge denied the application because of the hardship it would cause to O. K. Trucking Company (250-253). Defense counsel then requested that the telephone question and answer session between Eme and the prosecutor be read to the jurors (254).

This relief was summarily denied (255).*

C. The Charge**

Appellant requested that Judge Griesa instruct the jurors on the question of identification, and defense counsel submitted a charge designed to guide the jurors in their determination (Rec. on App., Doc. No. 15).*** Over defense objections (279),

*The Government also offered proof of a prior "similar act" -- a burglary of a fish wholesale establishment.

**The text of Judge Griesa's charge to the jury is reproduced as "C" to appellant's separate appendix.

***Defendant's Request No. 8 reads as follows:

REQUEST NO. 8

Identification

The evidence in this case raises the question of whether Mr. Montelbano was involved in the alleged hijacking and necessitates your resolving any uncertainty in testimony on that issue.

Testimony that is offered to prove the identity of another must be treated with extreme caution.

The burden of proof is on the prosecution with reference to every element of the crimes charged and included is the burden of proving beyond reasonable doubt the identity of the defendant as the perpetrator of the crimes charged. In appraising the identification testimony of a particular witness, you should take into account the following factors:

1. Was the identification made by the witness after the offense the product of his own recollection? If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize

FOOTNOTE CONTINUES ON NEXT PAGE.

Judge Griesa refused to give this instruction, stating:

I will not analyze the precise considerations about identification (279).*

After explaining the distinction between direct and circumstantial evidence and telling the jurors that they should consider both types of proof in determining appellant's guilt, Judge Griesa stated to the jurors that they "should, of course,

FOOTNOTE CONTINUED:

that identification with great care.

2. You may take into consideration the length of time that elapsed between the occurrence of the crime and the next time the witness saw the defendant.

3. You may take into consideration the nature of the witness' description of the accused; for example, was it detailed and accurate, or was it general and vague?

4. You should consider whether the witness was able to make a certain identification or whether he expressed doubts and said he wasn't sure.

5. The credibility of the identification witness should be considered in the same light as any other witness, whether he is truthful, and whether he had the capacity to make a reliable observation on the matter covered by his testimony.

Adapted from Judge Ward's charge in United States v. Charles Morrison, 77 Cr. 348 (RJW).

See United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972); United States v. Wilforth, 493 F.2d 730 (3d Cir. 1974).

*The Government argued that an instruction on the credibility of witnesses would be sufficient (278).

consider the direct evidence on the point consisting of Mr. Eme's testimony" (412). The judge did not instruct the jurors as to how they were to consider this identification testimony, simply indicating that the weight to be assigned to each item of evidence, as well as the proof as a whole, was "up to [the jurors] to decide" (412).

As to credibility, Judge Griesa listed the following factors for the jurors' consideration: the demeanor and manner of the witness, the inherent believability of the story and how it relates to the other evidence in the case, the witnesses' motive to lie, if any, and prior inconsistent statements (421-423).

After deliberations, the jury found appellant guilty as charged.

ARGUMENT

POINT I

THE JUDGE'S FAILURE, DESPITE DEFENSE COUNSEL'S REQUEST, TO INSTRUCT THE JURORS ON THE FALLIBILITY OF EYE-WITNESS TESTIMONY AND TO GUIDE THEIR DETERMINATION ON THE QUESTION IS REVERSIBLE ERROR.

The critical issue presented to the jurors for their determination in the trial was whether the truck driver had correctly identified appellant as a participant in the December 7, 1976 hijacking.* To establish that the man involved was appellant, the Government relied to a great extent on the truck driver's description of the events. However, Eme's identification testimony was so uncertain that the absence of proper guidance from the trial judge as to how to evaluate this evidence renders the jury's deliberations and verdict invalid.

During the crime, although the truck driver was with the hijacker, who the Government contended was appellant, for a substantial amount of time, Eme's opportunity to view the robber was extremely brief. Thus, while Eme saw the hijacker get

*Indeed, in his opening to the jury, defense counsel told the jury that the question of identification was the only issue in the case:

There is one issue in this case and that issue is did Fred Montelbano participate in the alleged hijacking of the truckload of seafood? That is it. It is very simple: did he?

(23).

into the truck, during the ride to Long Island, Eme was not wearing his glasses and looked straight ahead without turning. Similarly, later that afternoon, when Eme was in the Rambler with the hijacker, the truck driver was lying on the floor of the car with his face in that direction. That the hijacker's features did not make a lasting impression on Eme is shown by the subsequent events. At the line-up, held nine days after the robbery, Eme could only say that appellant "could possibly be the man ... " Even at trial, with appellant sitting at counsel table, Eme testified that he believed appellant to be one of the hijackers but admitted that he was uncertain. In light of these facts and the tentative nature of the truck driver's testimony, defense counsel's request for a jury instruction on eye-witness testimony was not only reasonable but imperative.

Judge Griesa denied that request, however. Mistakenly believing that the usual charge on witness credibility was adequate to cover the jury's consideration of the identification question, he chose instead to give only a general instruction on the credibility of witnesses. Indeed, he specifically told the jurors to "consider the direct evidence on the point [of guilt] consisting of Mr. Eme's testimony" (412), without cautioning them about the difficulties of eye-witness testimony, the possibility of honest mistake or indicating the factors which they should consider for a fair determination of the question. This failure requires reversal.

The fallibility of eye-witness testimony is succinctly described in an often quoted statement of Felix Frankfurter's in a book on the Sacco-Vanzetti case:

What is the worth of identification testimony, even if uncontradicted? The identification of strangers is proverbial y untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.

The Case of Sacco-Vanzetti,
30 (1927).

See United States v. Wade, 388 U.S. 218, 228 (1967); Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES, 6 (1965). Furthermore, as Wall notes, the problems of eye-witness identification are not bias or interest of the witness, but rather the limitations on human perception and memory:

... [C]ases of mistaken identity are surprisingly frequent. The cause of this apparent anomaly is the fact that the normal person sees but a few of someone else's distinguishing characteristics, retains even fewer in his mind, and is able to revive fewer still when asked to describe the person observed or to identify one thought to be the same. If the characteristics of the person to be identified are similar to the characteristics of the person originally observed as they now exist in the mind of the witness, the witness may very well recognize them, and make an erroneous identification ...

Id. at 10.

Because "[t]he vagaries of eye-witness identification are well known" (United States v. Wade, supra, 388 U.S. at 228) to both jurists and lawyers alike, and because, on the other hand,

juries of laymen are likely to be inappropriately and unduly receptive to eye-witness testimony (Wall, supra, at 19-23),* there is a growing trend in the various courts of appeals to require that the jury be equipped with a proper awareness of the problem.

Consequently, the Third, Fourth, Seventh, and District of Columbia Circuits, have required that an instruction on the question of identification be given. United States v. Barber, 442 F.2d 517, 528 (3d Cir.), cert. denied, 404 U.S. 958 (1971) (prospective application only); United States v. Holley, 502 F.2d 273, 277 (4th Cir. 1974) (reversal required because "the charge to the jury on the question of identification [was] insufficient"); United States v. Hodges, 515 F.2d 650, 653 (7th Cir. 1975) (reversal because of failure to give appropriate instructions); United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972); Macklin v. United States, 409 F.2d 174 (D.C. Cir. 1969). See also United States v. Dodge, 538 F.2d 770, 784 (8th Cir. 1976) ("we will view with grave concern the failure to give specific and detailed instructions on identification in future cases where identification of the defendant is based solely or substantially on eye-witness testimony.") But see United States v. Masterson, 529 F.2d 30, 32 (9th Cir. 1976).

*Wall categorizes the absence of a "healthy skepticism" on the part of jurors as the factor most aggravating the problem. Wall, supra, at 19.

Indeed, this Court has previously set forth the district court's obligation to give proper instructions on the issue of identification:

While a defendant is not entitled to a reading of all that was said about the dangers of misidentification in United States v. Wade, supra, 388 U.S. at 228-236, 87 S.Ct. at 1926, and Simmons v. United States, supra, 390 U.S. at 383-384, 88 S.Ct. at 967, we would think it reasonable that a properly drafted instruction, drawing particularly on Mr. Justice Harlan's language in Simmons, should be given if requested.

United States v. Fernandez,
456 F.2d 638, 643-644 (2d
Cir. 1972).

In Simmons v. United States, 390 U.S. 377, 383 (1968), Justice Harlan stated:

...Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification ... Regardless of how the initial identification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of the subsequent lineup or courtroom identification.

While the failure to give such a charge has been found not to be plain error (United States v. Evans, 484 F.2d 1178, 1187-1188 (2d Cir. 1973);* United States v. Lewis, Doc. No. 77-1224, slip op. 451, 460 (2d Cir., November 21, 1977); United

*Certainly, the "awful possibility" of the dangers of misidentification, see United States v. Evans, supra, and Brathwaite v. Manson, 527 F.2d 363, 369 n.11 (2d Cir. 1975), rev'd., 97 S.Ct. 2243 (1977), would be lessened by the requested instructions.

States v. Marchand, Doc. No. 77-1131, slip op. 5391, 5418 (2d Cir., August 22, 1977)), a proper instruction was submitted here.

Eme's eye-witness identification was critical to the Government's proof and inevitably played a substantial part in the jurors' determination.

Since it is our goal to guard against the occurrence of [the] injustice [of mistaken identification], we are convinced that neither the summation of counsel at the close of the evidence ... nor cross-examination as to the matter of identification by defense counsel adequately protects a defendant against the dangers of misidentification which are inherent in eye-witness testimony. Nor do we believe that such summation and cross-examination by counsel may substitute for proper instructions to the jury by the court.

United States v. Hodges,
supra, 515 F.2d at 653.

The failure to give such instructions improperly insulated the jurors from the healthy skepticism essential to their fair deliberations and provided no guidance as to the correct way in which to proceed. Accordingly, reversal is required.

POINT II

THE RULINGS OF THE DISTRICT COURT PRE-
CLUDED APPELLANT FROM PRESENTING HIS
DEFENSE TO THE JURORS.

The key question in this case was whether appellant was a participant in the hijacking or whether Eme had identified the wrong man. Evidence actually existed which would have been useful to the jurors' determination of this issue and probative of appellant's claim of misidentification. However, the rulings of the District Judge precluded appellant's production of this proof and its consideration by the jury.

A. The District Court erroneously refused to admit statements made by the informant and the unidentified truck driver.

Prior to trial, defense counsel requested that the Government be required to divulge the name and whereabouts of the informant and truck driver who had seen three men in the early morning of December 7, 1976 near the scene of the crime in the car used for the hijacking. This application was denied and, in response, appellant moved to admit various statements made by the informant to the authorities, which were relevant to the question of identification. These statements included various descriptions of the hijackers, which conflicted with appellant's appearance and Eme's description, as well as the following: that on the day of the hijacking the unidentified driver and the informant stated they could

identify the men in the Rambler; that despite this prior statement, on May 20, 1977, the informant failed to select appellant both from a photographic spread and a photograph of the line-up; and that the informant, when shown a single photograph of appellant, said that that person was not known to him. These statements were admissible pursuant to Rule 804(b)(5) of the Federal Rules of Evidence, and the judge's failure to admit them was error, requiring reversal.

Rule 804(b)(5) provides in pertinent part that a statement not admissible under the other provisions in the rule,* but which "ha[s] equivalent circumstantial guarantees of trustworthiness" is not excluded by the hearsay rule:

... if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement in evidence.

Rule 804 (b) (5).

The statements involved were relevant to the question of misidentification and obviously important to appellant's attempt to show that Eme had identified the wrong man. See United States v. Robinson, 544 F.2d 110, 113 (2d Cir. 1976). Because of the

*The threshold requirement -- that the declarant be unavailable -- was clearly met here. See Rule 801(a)(1).

Government's failure to disclose the informant's and truck driver's identity, the statements were the only available evidence of these descriptions and of the important fact that witnesses who had seen and could identify the hijackers on the day in question were unable to identify appellant at the time of trial and had given descriptions inconsistent with those furnished by Eme.* Finally, their admission would serve the interests of justice by permitting the jury to hear extremely relevant evidence pertaining to the determination of the identification question, thereby insuring its correct resolution and the proper decision on the issue.

The trustworthiness of the statements was great. The original descriptions were made to government agents shortly after the events in question. See United States v. Medico, 557 F.2d 309, 315 (2d Cir. 1977). The statements were made when complete anonymity had been guaranteed by the Government. Indeed, the Government's own affidavit (Affidavit of Agent Kosednar) established the informant's reliability. The informant had been supplying information to the FBI since November, 1976. He had never been arrested, "has no known involvement as a violator of the criminal laws," and was not a paid employee of the FBI.

*Thus, this testimony clearly would have been relevant to the accuracy of Eme's identification. While proof of a prior non-identification through a third party has been disallowed, United States v. Jenkins, 496 F.2d 57, 68-70 (2d Cir.), cert. denied, 420 U.S. 925 (1975), this "case seems doubtful because it was the defendant who wished to show that an eyewitness failed to pick out his picture from a spread." Weinstein's Evidence, Commentary at 801-110 n.27 (1975).

Affidavit, ¶4.

Moreover, the Government asserted and the District Court found that the informant's statements were made at great risk to the informant's life. Affidavit ¶9(1). Thus, the statements are analogous to "statements against interest," admissible pursuant to Rule 804(b)(3). In short, the very reasons for the Government's refusal to disclose the informant's identity establish that his statements were reliable.

The statements in question satisfied the requirements of admissibility set forth in Rule 804(b)(5). Their exclusion was error, requiring reversal.

B. The District Court erroneously excluded proof of Eme's descriptions of the hijackers given to the authorities near the date of the crime.

Shortly after the crime, Eme gave various descriptions of the hijackers to the police and FBI. These descriptions, reflected in police reports, showed that Eme had failed to notice whether the hijacker, who he claimed was appellant, had a broken tooth -- appellant's most unusual feature. The reports also indicated that Eme did not give a detailed description of the car until December 13, 1976 and, on the date of the hijacking, had not described the hijacker's hair as receding or thinning. As to the description given to the Nassau County police on December 7, 1976, Eme stated that this was the "best description" of the hijacker he could give. To prove this

description, after Eme had left the stand, defense counsel offered in evidence Eme's December 7, 1976 statement -- a "supporting deposition," sworn to under the penalties of state law -- and, in the alternative the testimony of the police officer who prepared the deposition. This evidence would have been strong proof of Eme's failure to observe at the time of the hijacking, his failure to describe the specific details of the hijacker's appearance and car, and the consequent possibility that suggestive police procedures contributed to the subsequent descriptions. Yet, the evidence of this prior statement was excluded, as were additional descriptions of the hijacker and car reflected in other police memoranda.

The District Court's decision, excluding evidence of Eme's prior statements, was based on its belief that the requirements of Rule 613 of the Federal Rules of Evidence were applicable* and that, therefore, the defense was required to confront the witness with his prior statement. However, the judge's analysis of the question was incorrect. This is so since the Rule's requirements only apply to "extrinsic evidence of inconsistent

*Rule 613(b) provides as follows:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

statements," Rule 613(b), and the prior statements offered in evidence were generally consistent with Eme's trial testimony.* See Victory v. Bombard, Doc. No. 77-2075, slip op.____ (2d Cir., January 16, 1977 at 6).

Moreover, even if the proof were considered prior inconsistent statements, the necessary foundation, including "naming the time, place, and the person to whom made," was satisfied. Weinstein's Evidence, Commentary, ¶613[04] at 613-616 (1975). Thus, Eme admitted making the statement and essentially confirmed its substance, obviating any hearsay problem. Indeed, as to the failure to mention the receding hairline in the original statement, defense counsel, on cross-examination, had focused the witness' attention on that detail in the prior description. Moreover, the prosecutor was effectively offered the opportunity to examine the truck driver about these matters during his telephone conversation with Eme, the minutes of which defense counsel requested be read to the jury. In that conversation, Eme stated that although he saw the hijacker's mouth, he "did not notice anything in detail about his teeth," did not notice a cracked tooth, or tell police officers anything about that physical characteristic (245-246). Further, Eme stated, contrary to his written deposition and trial testimony,

*At trial Eme described the hijacker as 6'1", 160 pounds, with receding hair, thinning on top, wearing a peacoat and dungarees (39-40). Eme testified that he had told the Nassau County police that the hijacker was in his twenties, with black hair, weighing between 150 and 165 pounds, tall and slim. The description contained in the police report was "25 years, 6 feet, 150 pounds, black hair, blue peacoat, dark."

that he had told the Nassau County police that the hijacker had receding hair and indicated that he dictated the statement and did not make corrections. Consequently, any applicable foundation requirements of Rule 613 were satisfied, and the statements should have been admitted.

In any event, even if considered inconsistent, at least the deposition given to the Nassau County police was admissible as non-hearsay evidence pursuant to the provisions of Rule 801(d)(1)(A) of the Federal Rules of Evidence. This Rule provides, in part, that a statement is not hearsay if "[t]he declarant testifies at trial ... is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at ... or in a deposition." Rule 801(d)(1)(A).

The Nassau County statement (Appellant's appendix "E"), styled a "supporting deposition," was such a document. It contained the clear warning that false statements were punishable as a class A misdemeanor under state law and consequently fulfilled the oath requirement. Further, the declarant testified at trial, and the right of cross-examination was effectively preserved by the prosecutor's telephonic questioning. Moreover, during that questioning Eme again adopted his prior statement, eliminating any hearsay problem. See Rule 801, Advisory Committee's Note, quoted in Weinstein, supra, at 801-31.

Finally, the various statements of description of the hijacker and car were admissible under subdivision (C) of Rule

801(d)(1) as statements of identification. The prerequisite of the Rule -- "cross-examination" -- a requirement designed to protect defendants from unfair testimony, see United States v. Lewis, supra, slip op. at 456; United States v. Marchand, supra, slip op. at 5416, was satisfied here by the prosecutor's interrogation of the witness by telephone. Consequently the statements were admissible on this theory also.*

C. The District Court erroneously excluded the prosecutor's telephone conversation with the truck driver.

In an effort to resolve the defense request to recall Eme as a witness, the prosecutor, by agreement, telephoned the witness outside defense counsel's presence. As a result of the conversation, extremely relevant evidence relating to Eme's observation of the hijacker and his later descriptions was elicited. Despite the obvious reliability of the statements and over defense objections, the judge, without explanation, excluded proof of the questions and answers.

The proof was extremely probative of appellant's claim of misidentification and obvious "grist for the jury mill," Manson v. Brathwaite, 97 S.Ct. 2243, 2254 (1977).

*The case relied upon by the Government, United States v. DiNapoli, 557 F.2d 962, 965 (2d Cir. 1977) is inapposite since it deals with a prior statement showing bias.

In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers v. Mississippi,
410 U.S. 284, 302 (1973).

Moreover, the telephonic testimony clearly satisfied the requirements of Rule 804(b)(5) of the Federal Rules of Evidence (See discussion, infra, Point II(A)). Because of the judge's refusal to permit the defense to recall Eme, the witness was now unavailable. His statement was obviously evidence of a material fact and the only probative evidence on the point. Finally, the ends of justice would have been served since its admission would have allowed the jurors to hear critical evidence pertaining to their determination of culpability.

* * *

The rulings by the District Court precluded appellant from presenting critical evidence relevant to the key issue in the case -- misidentification. Because of their importance to this question and the defense claim that Eme had identified the wrong man, each is, of itself, sufficient to require reversal. However, their combined effect clearly precluded appellant's presentation of his case and gave the jury a distorted view of the circumstances involved. Accordingly, a new trial is required.

CONCLUSION

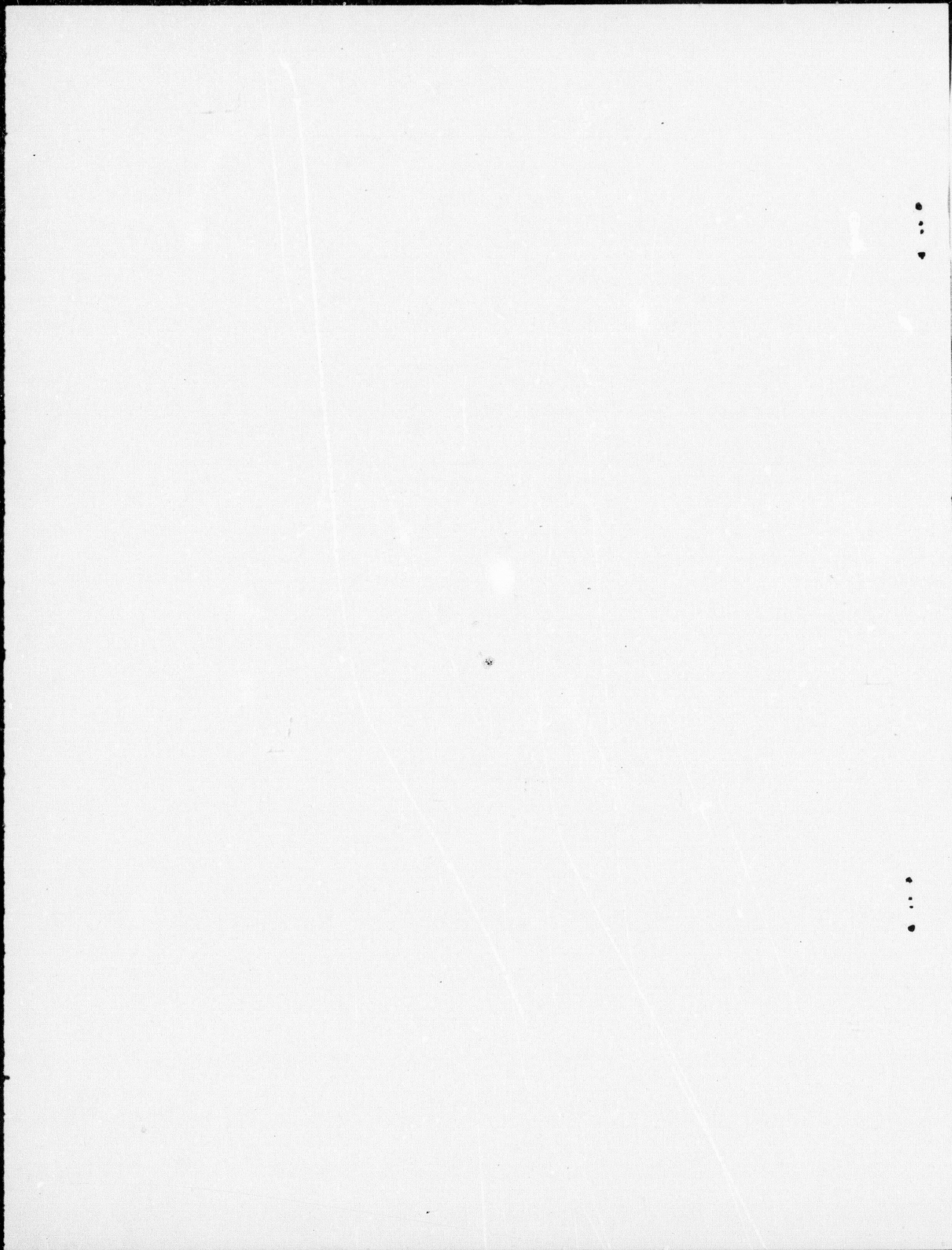
For the foregoing reasons, the decision of the District Court must be reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 16, 1978

I certify that a copy of this brief [REDACTED] has been mailed to the United States Attorney for the Southern District of New York.

Malcolm J. Silbermann